In the Supreme Court

OF THE

United States

Supreme Court, U. S.
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OCTOBER TERM, 1944

No. 1176

UNION PACIFIC RAILROAD COMPANY
(a corporation),
Petitioner,

vs.

CHARLOTTE B. LEET, Administratrix of the Estate of Harold Patrick Utterback, Deceased,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE M. NAUS,
Alexander Building, San Francisco 4, California,
Attorney for Respondent.

CLIFTON HILDEBRAND,
Bank of America Building, Oakland 12, California,
LOUIS H. BROWNSTONE,
Russ Building, San Francisco 4, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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CHARLOTTE B. LEET, Administratrix of the Estate of Harold Patrick Utterback, Deceased,
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On Petition for Writ of Certiorari to the Supreme Court of the State of California.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of California is not yet officially reported. It appears in the Advance Sheets of the California Reports at 25 Advance California Reports, 764 and appears in the Advance Sheets of Volume 155 Pacific Reporter, Second Series, page 42. It also appears in the record at page 70.

JURISDICTION.

The opinion of the Supreme Court of the State of California was rendered December 30, 1944. A petition for a rehearing was denied by the Supreme Court of California January 25, 1945. Petition for writ of certiorari was filed on April 18, 1945 and served on respondent on April 25, 1945. Jurisdiction, if present, must come from Section 237b of the Judicial Code as amended by the Act of February 13, 1925 but is not present because of the absence of any substantial federal question.

ARGUMENT.

GROUNDS FOR CERTIORARI ARE NOT PRESENT.

Utterback, a fireman employed by petitioner, was killed in a collision which occurred near Portland, Oregon on February 7, 1942. Respondent, after appointment as administratrix of the estate of Utter-

back (see *Estate of Waits*, 146 Pac. 2d 5, 23 A.C. 693), instituted an action in the Superior Court of the State of California in and for the County of Los Angeles to recover damages for the death of Utterback under the Federal Employers' Liability Act (45 U.S.C.A. 51) on April 27, 1942. Answer was filed by respondent May 28, 1942 (R. 3) and the case was then at issue and ready for trial. Four months later on September 26, 1942 (R. 14) petitioner filed a complaint in equity in the Circuit Court of the State of Oregon against Utterback's wife, son and daughter, in an attempt to enjoin the California proceeding. The action of the Oregon lower Court in granting such an injunction was reversed by the Supreme Court of Oregon (146 Pac. 2d 76—opinion on denial of rehearing 769). Petitioner herein filed a petition before this Court for certiorari in the Oregon proceeding (October Term, 1943, No. 1029) and the petition for writ of certiorari was denied by this Court on the 9th day of October, 1944. (89 L. Ed. Adv. Op. No. 1, p. 35.) Although the California proceeding was at issue and ready for trial upon the filing of petitioner's answer on May 28, 1942, on November 14, 1942 petitioner filed in the California proceeding a notice of motion to abate proceeding. (R. 13.) The motion was based on the affidavit of Malcolm Davis, to which was attached a copy of the complaint in the Oregon proceeding. This complaint alleged, as claimed grounds for injunctive relief, hardship upon the petitioner and interference with the war effort in that proper presentation of a defense in California would require petitioner to transport a number of its Oregon employees to California. The complaint does not claim

that the evidence of petitioner's witnesses could not be presented in deposition form under the laws of the State of California but claims only that "usually such explanations cannot be made adequately or understandably by witnesses testifying by deposition only." (R. 20.) Petitioner's motion to abate was denied November 20, 1942. On December 7, 1942 petitioner filed a notice of motion to continue trial. (R. 42.) The case had been set for December 11, 1942 for trial and on the hearing of the motion was continued for trial from December 11, 1942 to December 21, 1942. (R. 67.) On December 14, 1942 petitioner filed an amended answer. On December 21, 1942 at the opening of the trial, petitioner renewed its motion for an indefinite continuance and the motion was denied. (R. 67.) The trial resulted in a verdict and judgment in favor of respondent in the amount of $30,000.00.

It is conceded that the California Courts assume jurisdiction of a tort action in which the accident occurred and the parties reside in other states.

Loranger v. Nadeau, 215 Cal. 362;

Rubin v. Schupp, 127 Fed. 2d 625, C.C.A. 9.

The cases cited by petitioner on page 9 of its brief concern themselves with motions for change of venue from the California Superior Court of one County to the Superior Court in another County on the ground of convenience of witnesses under California Code of Civil Procedure 397, subdivision 3. They have nothing to do with the issue at bar. Therefore, under California law if the cause of action here in question arose under Oregon state law rather than under the Federal

Employers' Liability Act, the California Superior Court would have assumed jurisdiction. It is conceded that the Superior Court is a Court of general jurisdiction adequate to entertain actions under the Federal Employers' Liability Act, and that no question of State Court venue is here involved.

The Supreme Court of the State of California held "The Court (the trial Court) denied defendant's motions without opinion and it must be assumed that the denial was on the merits." (R. 72.) The dissenting opinion starts out with the following statement: "I cannot agree with the assumption made by Mr. Justice Carter that the motions of the railroad company to continue the trial of the two actions were denied upon the merits." (R. 86.) The opinion of the Court therefore, determined that petitioner's motions were denied *on the merits.*

There is nothing in the Federal Employers' Liability Act which compels the California Court to abate a proceeding under the Federal Employers' Liability Act because the accident occurred and the parties reside in another state. It is conceded that petitioner does business in California and that its lines of railroad run through California, and California's jurisdiction is therefore sufficient under *Denver & Rio Grande W. RR. Co. v. Terte,* 284 U.S. 284.

This Court has held that a cause of action must not be discriminated against because it is a Federal one. In the absence of an otherwise valid excuse a State Court of competent jurisdiction must entertain an action under the Federal Employers' Liability Act.

McKnett v. St. Louis & SF. R. Co., 292 U.S. 230.

This rule was restated in the case of *Herb v. Pitcairn*, February 5, 1945, 89 L. Ed. Adv. Op., page 481, at page 485. Since the California Court will entertain jurisdiction of a foreign state tort, there is no reason for it to refuse jurisdiction of a foreign Federal tort. Since the California Supreme Court has held that the motions of petitioner were denied on the merits, there is no Federal question here presented.

It was not incumbent upon the California Courts to grant petitioner's motions merely because petitioner claimed an interference with the war effort. During Federal control of railroads in the last World War, the Director General of such railroads as were under Federal control, ordered that all suits against carriers while under Federal control must be brought in the County or District where the plaintiff resided at the time of the accrual of the cause of action or in the County or District where the cause of action arose. (See *Alabama & Vicksburg R. Co. v. Journey*, 257 U.S. 111.) No such order has been made during this war and the Union Pacific was not and is not now under Federal control. The California Supreme Court has held that the exigencies of the war effort absent any legislative or executive fiat do not require it to abate the further prosecution of litigation based upon the Federal Employers' Liability Act where it is conceded that petitioner does business and operates a portion of its railroad system in California. No reason appears why the decision of this Court in *Miles v. Illinois Central Ry. Co.*, 315 U.S. 698 following *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44 and the *McKnett* case should not be followed.

The Federal Employers' Liability Act, as a "law of the United States" made in pursuance of the Constitution is the "supreme law of the land" (Constitution, Article VI), i.e., it is a part of the substantive law of each state of the Union of States. In enforcing the law in a State Court, it is State judicial power, not Federal judicial power, that is exerted. There is a clear distinction between the opening and the closing of State Courts to plaintiffs seeking enforcement of a Federal substantive right. If California had closed her Courts to such a plaintiff for the duration of the war there would be a question for the Federal Supreme Court, but at bar the California Courts have in substance simply ruled that the State Courts will be kept open for the enforcement of the substantive law of the land made by the Congress in pursuance of the Constitution.

No Federal right, substantial or otherwise, was denied to petitioner. No question of substance not therefore determined by this Court was involved and the decision of the California Court is strictly in accord with applicable decisions of this Court. It is respectfully submitted that the petition for certiorari is entirely devoid of merit and should be denied.

Dated, San Francisco, California,
May 14, 1945.

GEORGE M. NAUS,
Attorney for Respondent.

CLIFTON HILDEBRAND,
LOUIS H. BROWNSTONE,
Of Counsel.